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Public Prosecutor & Ors v Wong Ong Hua & Anor

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(A)-66–02 OF 2023
AZIZAH NAWAWI, SEE MEE CHUN AND MOHAMED ZAINI MAZLAN JJCA
18 DECEMBER 2024

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Constitutional Law — Legislation — Constitutionality — Constitutionality of ss 4 and 20 of Extradition Act 1992 ('Act 479') — Minister of Home Affairs made an order under s 4 of Act 479 to sessions court judge, giving direction that procedures under s 20 of Act 479 was to be applied to extradition proceedings — High Court declared ss 4 and 20 of Act 479 unconstitutional for breach of doctrine of separation of powers — Whether s 4 read with s 20 of Act 479 was ultra vires art 121(1) of Federal Constitution — Whether role of sessions court under s 20 of Act 479 was purely administrative or judicial — Whether extradition proceeding was a trial or not — Extradition Act 1992 ss 4 & 20 — Federal Constitution art 121(1)

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The respondents were suspected of being fugitive criminals and were arrested on 14 September 2020. The respondents were arrested by the police executing a provisional warrant of apprehension ('the PWA') under s 13(1)(b) of the Extradition Act 1992 ('Act 479'). The PWA was issued at the request by the US Government pursuant to article 11 of an Extradition Treaty dated 3 August 1995 between the US Government and the Government of Malaysia. The respondents were remanded for a period of 60 days pursuant to s 16(1) of Act 479. The Minister of Home Affairs ('the Minister') then made an order under s 4 of Act 479 to the sessions court judge, giving direction that the procedures under s 20 of Act 479 was to be applied to the extradition proceedings. When the respondents appeared before the sessions court, they were granted bail. The respondents then filed originating summons ('the OS') for a declaration that ss 4 and 20 of Act 479 were unconstitutional, null, void and of no effect being in contravention of arts 4(1), 5(1), 5(2), 8(1), 8(2), 9(1), 9(2) and 121(1) of the Federal Constitution ('the Constitution'). The OS was allowed by the High Court. The High Court judge held that s 20 of Act 479 which allowed the Minister, an executive figure, to give directions to the judiciary, was in breach of the doctrine of separation of powers under art 121 of the Constitution. The learned judge then declared that s 20 of Act 479 was unconstitutional as it encroached on judicial independence. Aggrieved by the said decision, the prosecution filed the present appeal. The only issue for the court's consideration was whether s 4 read with s 20 of Act 479 was ultra vires art 121(1) of the Constitution.

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Held, allowing the appeal and setting aside the decision of the High Court judge with no order as to costs:

(1) The issue of whether the role of the sessions court under s 20 of Act 479 was purely administrative or judicial had already been decided by the Federal Court in *Said Mir Bahrami v Pengarah Penjara Sungai Buloh, Selangor* [2013] 2 MLJ 478. In the said case, the Federal Court held that extradition proceedings were based on comity and reciprocity, serving as a committal process rather than a full trial. They aimed to determine if the evidence was sufficient for extradition, not to assess the appellant's guilt. As such committal proceedings were not criminal trials conducted to ascertain a person's guilt (see paras 36 & 41).

(2) Therefore, the Federal Court had already decided that an extradition proceeding was not a trial. While the term prima facie was mentioned, the committing magistrate's discretion to admit or reject evidence was limited. This aligned with the principles of comity and reciprocity in extradition proceedings, ensuring that local fairness standards did not override international treaty obligations and standard rules of admissibility. Extradition proceedings must also follow established rules and procedures under s 20 of Act 479. This section ensured fairness by allowing both prosecution and defence to present their case. It required the prosecution to provide supporting documents and mandated that the alleged act, if committed in Malaysia, must constitute an offense under Malaysian law. Additionally, it allowed the fugitive to raise defences against the extradition request as set out in sub-s 20(1)(d) of Act 479 (see paras 44–45).

(3) Since an extradition proceeding was not a trial, it was not an exercise of judicial power. Therefore, since the session court was not exercising judicial power in an extradition proceeding under s 4 read with s 20 of Act 479, there was no issue of interfering with the session court's judicial power as held by the learned High Court judge. Section 4 read with s 20 was therefore not ultra vires art 121(1) of the Constitution. For the above reasons, the court found that the learned High Court judge had erred in law in his decision that warranted the appellate intervention (see paras 46–47).

[Bahasa Malaysia summary

Responden-responden telah disyaki sebagai penjenayah-penjenayah buruan dan telah ditangkap pada 14 September 2020. Responden-responden telah ditangkap oleh pihak polis semasa melaksanakan waran tangkap sementara di bawah s 13(1)(b) Akta Ekstradisi 1992 ('Akta 479'). Waran Tangkap Sementara tersebut telah dikeluarkan atas permintaan Kerajaan AS menurut perkara 11 Perjanjian Ekstradisi bertarikh 3 Ogos 1995 antara Kerajaan AS dan Kerajaan Malaysia. Responden-responden telah direman selama tempoh

60 hari menurut s 16(1) Akta 479. Menteri Hal Ehwal Dalam Negeri ('Menteri') kemudian membuat perintah di bawah s 4 Akta 479 kepada hakim mahkamah sesyen, memberikan arahan bahawa prosedur di bawah s 20 Akta 479 akan digunakan untuk prosiding ekstradisi. Apabila responden-responden hadir di hadapan mahkamah sesyen, ikat jamin telah dibenarkan. Responden-responden kemudiannya memfailkan saman pemula untuk pengisytiharan bahawa ss 4 dan 20 Akta 479 adalah tidak berperlembagaan, terbatal, tidak sah dan tidak berkuat kuasa kerana melanggar perkara 4(1), 5(1), 5(2), 8(1), 8(2), 9(1), 9(2) dan 121(1) Perlembagaan Persekutuan ('Perlembagaan'). Saman pemula tersebut telah dibenarkan oleh Mahkamah Tinggi. Hakim Mahkamah Tinggi memutuskan bahawa s 20 Akta 479 yang membenarkan Menteri, seorang pemimpin eksekutif, untuk memberi arahan kepada badan kehakiman, adalah melanggar doktrin pemisahan kuasa di bawah perkara 121 Perlembagaan. Hakim yang bijaksana kemudian mengisytiharkan bahawa s 20 Akta 479 adalah tidak berperlembagaan kerana ia menceroboh kebebasan kehakiman. Terkilan dengan keputusan tersebut, pihak pendakwaan memfailkan rayuan semasa. Satu-satunya isu untuk pertimbangan mahkamah ialah sama ada s 4 yang dibaca bersama s 20 Akta 479 adalah ultra vires perkara 121(1) Perlembagaan.

Diputuskan, membenarkan rayuan dan mengenepikan keputusan hakim Mahkamah Tinggi tanpa perintah mengenai kos:

(1) Isu sama ada peranan mahkamah sesyen di bawah s 20 Akta 479 adalah semata-mata pentadbiran atau kehakiman telah pun diputuskan oleh Mahkamah Persekutuan dalam kes *Said Mir Bahrami v Pengarah Penjara Sungai Buloh, Selangor* [2013] 2 MLJ 478. Dalam kes tersebut, Mahkamah Persekutuan memutuskan bahawa prosiding ekstradisi adalah berdasarkan komiti dan kesalingan, yang berfungsi sebagai proses pengkomitan dan bukannya perbicaraan penuh. Ia bertujuan untuk menentukan sama ada keterangan adalah mencukupi untuk ekstradisi, bukan untuk menilai kesalahan perayu. Oleh itu, prosiding pengkomitan sedemikian bukanlah perbicaraan jenayah yang dijalankan untuk menentukan kesalahan seseorang (lihat perenggan 36 & 41).

(2) Oleh itu, Mahkamah Persekutuan telah memutuskan bahawa prosiding ekstradisi bukanlah perbicaraan. Walaupun istilah prima facie dinyatakan, budi bicara majistret yang memberikan pengkomitan untuk menerima atau menolak keterangan adalah terhad. Ini selaras dengan prinsip komiti dan persalingan dalam prosiding ekstradisi, memastikan bahawa piawaian keadilan tempatan tidak mengatasi obligasi perjanjian antarabangsa dan peraturan standard kebolehterimaan. Prosiding ekstradisi juga harus mematuhi peraturan dan prosedur yang ditetapkan di bawah s 20 Akta 479. Seksyen ini memastikan keadilan dengan membenarkan kedua-dua pihak pendakwaan dan pembelaan mengemukakan kes mereka. Ia mewajibkan pihak pendakwaan untuk

menyediakan dokumen sokongan dan mewajibkan bahawa perbuatan yang didakwa itu, jika dilakukan di Malaysia, harus berjumlah kepada kesalahan di bawah undang-undang Malaysia. Di samping itu, ia membenarkan buronan untuk mengemukakan pembelaan terhadap permintaan ekstradisi seperti yang dinyatakan dalam sub-s 20(1)(d) Akta 479 (lihat perenggan 44–45).

(3) Memandangkan prosiding ekstradisi bukanlah perbicaraan, ia bukanlah pelaksanaan kuasa kehakiman. Oleh itu, memandangkan mahkamah sesyen tidak menjalankan kuasa kehakiman dalam prosiding ekstradisi di bawah s 4 yang dibaca dengan s 20 Akta 479, tidak timbul isu campur tangan terhadap kuasa kehakiman mahkamah sesyen seperti yang diputuskan oleh hakim Mahkamah Tinggi yang bijaksana. Seksyen 4 yang dibaca dengan s 20 oleh itu bukanlah ultra vires perkara 121(1) Perlembagaan. Atas sebab-sebab di atas, mahkamah mendapati bahawa hakim Mahkamah Tinggi yang bijaksana telah terkhilaf dari segi undang-undang dalam keputusannya yang mewajarkan campur tangan rayuan (lihat perenggan 46–47).]

Cases referred to

Chua Han Mow v Superintendent of Pudu Prison [1980] 1 MLJ 219; [1979] 1 LNS 14, FC (refd)

Said Mir Bahrami v Pengarah Penjara Sungai Buloh, Selangor [2013] 2 MLJ 478; [2013] 5 CLJ 447, FC (refd)

Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case [2017] 3 MLJ 561; [2017] 5 CLJ 526, FC (refd)

Legislation referred to

Extradition Act 1992 ss 4, 12, 13(1)(b), 16(1), (2), 19, 19(4), (5), 20, 20(1)(a), (1)(b), (1)(c), (1)(d)

Federal Constitution arts 4(1), 5(1), (2), 8(1), (2), 9(1), (2), 121, 121(1)

Land Acquisition Act 1960 s 40D, 40D(1)

Migration Act 1958 [AU]

Appeal from: *Wong Ong Hua & Anor v Public Prosecutor, Malaysia & Ors* [2023] MLJU 646 (High Court, Kuala Lumpur)

Shamsul Bolhassan (with Liew Horng Bin and Noorul Fhaiez bt Mohd) (Attorney General's Chambers) for the appellants.

JR Tey (JR Tey) for the respondents.

Azizah Nawawi JCA:

INTRODUCTION

[1] This is an appeal against the decision of the learned High Court judge delivered on 26 January 2023 which allowed the respondents' originating summons ('OS'), inter alia, seeking the following reliefs:

(a) a declaration that ss 4 and 20 of the Extradition Act 1992 are unconstitutional, null, void and of no effect being in contravention of art 4(1) of the Federal Constitution;

(b) a declaration that ss 4 and 20 of the Extradition Act 1992 are unconstitutional, null, void and of no effect being in contravention of art 5(1) and (2) of the Federal Constitution;

(c) a declaration that ss 4 and 20 of the Extradition Act 1992 are unconstitutional, null, void and of no effect being in contravention of art 8(1) and (2) of the Federal Constitution;

(d) a declaration that ss 4 and 20 of the Extradition Act 1992 are unconstitutional, null, void and of no effect being in contravention of art 9(1) and (2) of the Federal Constitution; and

(e) a declaration that ss 4 and 20 of the Extradition Act 1992 are unconstitutional, null, void and of no effect being in contravention of art 121(1) of the Federal Constitution.

THE SALIENT FACTS

[2] The respondents are suspected to be fugitive criminals and were arrested on 14 September 2020.

[3] The respondents were arrested by the police executing a provisional warrant of apprehension ('PWA') under s 13(1)(b) of the Extradition Act 1992 ('the EA 1992') issued by the Kuala Lumpur magistrates court on 11 September 2020.

[4] The PWA was issued at the request by the Government of the United States of America ('the US Government') dated 3 September 2020 to the Government of Malaysia ('GOM'). The request was made under article 11 of an Extradition Treaty dated 3 August 1995 between the US Government and GOM ('the Treaty').

[5] The respondents were then remanded by the Kuala Lumpur magistrates court for a period of 60 days pursuant to s 16(1) of the EA 1992.

[6] On 8 October 2020, the Minister of Home Affairs ('the Minister'), issued an order and signified to the magistrate that the US Government had made a requisition for the return of the respondents pursuant to s 12 of the EA 1992.

[7] On 8 October 2020, the Minister also made an order under s 4 of the EA 1992 to the sessions court judge, giving direction that the procedures under s 20 is to be applied to the extradition proceedings ('the prima facie exclusion order'). The said order reads as follows:

> To a Judge of a Sessions Court, Whereas, in the exercise of the powers conferred upon me by virtue of section 4 of the Extradition Act 1992 [Act 479], I, Dato' Seri Hamzah bin Zainudin, the Minister of Home Affair, do hereby direct that the procedures under section 20 of the Extradition Act 1992 [Act 479] be applied in relation to the extradition request from the Government of United States of America for the case of Wong Ong Hua (Nric No: 740704–08–5051) and Ling Yang Ching (Nric No: 880509–08–5173) who are accused of the following offences within the jurisdiction of United States of America ...

[8] On 13 October 2020, the magistrate ordered that the proceedings be transmitted to the sessions court, and the remand of the respondents were extended until their appearance before the sessions court in accordance with s 16(2) of the EA 1992.

[9] On 9 February 2021, the respondents were granted bail on the condition that they each provide a bail bond of RM500,000 with two sureties. The respondents complied with this condition and are now released on bail.

[10] On 14 September 2021, the respondents instituted the OS in the High Court, and applied for a stay of the extradition proceedings in the sessions court pending the hearing and disposal of the OS at the High Court.

[11] On 23 June 2022, an application to strike out the respondent's OS was dismissed by the High Court.

[12] On 26 January 2023, learned High Court judge allowed prayer (1) to (5) of the OS whereas prayer (6) and (7) were dismissed with no order as to cost.

DECISION OF THE HIGH COURT

[13] The learned High Court judge held that s 20 of the EA 1992 grants the sessions court a judicial, not merely an administrative role, particularly on complex legal matters. If the matter is purely administrative, a magistrate could have handled the applications under s 20.

[14] The learned judge also held that the wording in s 20 of the EA 1992, especially the mandate to commit a fugitive to prison based on a Minister's direction, requires the sessions court to make legal determinations. The use of the word 'shall' therefore restrict judicial discretion, as it leaves no room for the sessions court to exercise its judicial discretion. The word 'shall' in s 20 denotes a mandatory requirement.

[15] Therefore, the learned judge held that s 20, which allows the Minister, an executive figure, to give directions to the judiciary, is in breach of the doctrine of separation of powers under art 121 of the Federal Constitution. The learned judge then declared s 20 of the EA 1992 to be unconstitutional as it encroaches on judicial independence.

OUR DECISION

[16] The Extradition Treaty between Malaysia and the United States requires both countries to surrender criminal fugitives to one another based on the terms of the treaty. The EA 1992 allows the Minister to surrender fugitives to a requesting country, following the procedure and requirements set out in the EA 1992, but with certain restrictions. The extradition process begins when a requisition for the return of a criminal fugitive is made. This triggers a hearing to review the representation supporting the extradition request, in line with the EA 1992.

[17] Therefore, before we deal with the merits of this appeal, it is pertinent for us to refer to the relevant provisions in relation to extradition proceedings.

[18] Section 4 is on the direction of the Minister to apply s 20 of the EA 1992 and it reads:

> 4 Direction of the Minister to apply procedure in section 20
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> Where the binding arrangement which has been entered into between Malaysia and any country for the extradition of fugitive criminals contains a provision for the prima facie requirement to be dispensed with either generally or in relation to a class or classes of offences, the Minister may give a direction in writing that the procedure specified in section 20 shall apply to such cases.

[19] Section 19 of the EA 1992 is on the procedure before the session court:

> (1) Where the fugitive criminal is brought before the Sessions Court, the Sessions Court shall receive any evidence tendered by or on behalf of the fugitive criminal to show —
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> (a) that he did not do or omit to do the act alleged to have been done or omitted by him;

(b) that he is not the person against whom the warrant was issued in the country which seeks his return;

(c) that the alleged act or omission is not an extradition offence in relation to the country which seeks his return;

(d) that the offence is of a political character, or that the proceedings are being taken with a view to try or punish him for an offence of a political character;

(e) that the offence is an offence under military law which is not also an offence under the general criminal law;

(f) that the alleged act or omission does not constitute an offence under the law of Malaysia;

(g) that his return would not be in accordance with the provisions of this Act;

(h) that he has been previously convicted or acquitted or pardoned by a competent tribunal or authority in the country which seeks his return or in Malaysia in respect of the alleged act or omission; or

(i) that the request for his surrender was made for the purpose of prosecuting or punishing him on account of his race, religion, nationality or political opinions, or that he might be prejudiced at his trial or punished or imprisoned by reason of his race, religion, nationality or political opinions.

(2) Nothing in this section shall limit the power of the Sessions Court to receive any other evidence that may be tendered to show that the fugitive criminal should not be returned.

(3) For the purposes of paragraph (2)(d), the Sessions Court may receive such evidence as in its opinion may assist it in determining the truth, whether or not such evidence is otherwise legally admissible in a court of law.

(4) If the Sessions Court is of the opinion that a prima facie case is not made out in support of the requisition of the country concerned, the Court shall discharge the fugitive criminal.

(5) If the Sessions Court is of the opinion that a prima facie case is made out in support of the requisition of the country concerned, the Court shall commit the fugitive criminal to prison to await the order of the Minister for his surrender, and shall report the result of its inquiry to the Minister; and shall forward together with such report any written statement which the fugitive criminal may desire to submit for the consideration of the Minister.

[20] Section 20 of the EA 1992 provides as follows:

(1) Where a direction has been given by the Minister under section 4, the Sessions Court shall —

(a) after hearing any representation made in support of the extradition request;

(b) upon the production of supporting documents in relation to the offence;

(c) upon being satisfied that the alleged act or omission of the fugitive criminal would, if it had taken place in Malaysia, constitute an offence under the laws of Malaysia;

(d) if the fugitive criminal does not satisfy the Court that there are substantial grounds for believing that —

(i) the offence is an offence of a political character, or that the proceedings are being taken with a view to try or punish him for an offence of a political character;

(ii) prosecution for the offence in respect of which his return is sought is barred by time in the country which seeks his return;

(iii) the offence is an offence under military law which is not also an offence under the general criminal law;

(iv) the fugitive criminal has been acquitted or pardoned by a competent tribunal or authority in the country which seeks his return or in Malaysia;

(v) the fugitive criminal has undergone the punishment provided by the law of the country which seeks his return or of Malaysia in respect of the extradition offence or any other offence constituted by the same conduct as that which constitutes the extradition offence;

(e) upon being satisfied that the fugitive is not accused of an offence, nor undergoing a sentence in respect of an offence, in Malaysia, other than the extradition offence in respect of which his return is sought, commit the fugitive criminal to prison to await the order by the Minister for his surrender.

(2) In the proceedings before the Sessions Court under subsection (1) the fugitive criminal is not entitled to adduce, and the Court is not entitled to receive, evidence to contradict the allegation that the fugitive criminal has done or omitted to do the act which constitutes the extradition offence for which his return is sought.

(3) In this section, 'supporting documents' means —

(a) any duly authenticated warrant for the arrest of the fugitive criminal issued by the country which seeks his return or any duly authenticated copy of such warrant;

(b) any duly authenticated document to provide evidence of the fugitive criminal's conviction or sentence or the extent to which a sentence imposed has not been carried out; and

A (c) a statement in writing setting out a description of, and the penalty applicable in respect of, the offence and a duly authenticated statement in writing setting out the conduct constituting the offence.

B **[21]** Essentially the complaint of the respondents is that the Minister had invoked s 4 of the EA 1992 to apply the procedures under s 20 of the EA 1992, instead of applying the procedures under s 19 of the EA 1992. Therefore, the complaint of the respondents is on the distinction between the application of ss 19 and 20 of the EA 1992.

C **[22]** Under s 19(5) of the Extradition Act 1992, the sessions court must determine if there is enough evidence (a prima facie case) to support the requesting country's requisition. If a prima facie case has been made out, the court will imprison the fugitive until the issuance of the Minister's extradition D order. If a prima facie case is not made out, the fugitive criminal must be discharged. The court must also report the findings to the Minister and submit any statement from the fugitive for review.

E **[23]** However, s 20 of the EA 1992 prevents the sessions court from considering evidence contradicting the allegations against the fugitive. If the requirements in sub-ss 20(1)(a) to (d) are met, the court must order the committal of the fugitive to prison, pending the decision on whether to surrender the fugitive to the requesting country.

F **[24]** Therefore, the difference between the procedures under s 19 and s 20 is the requirement of the prima facie case. Unlike s 20, s 19(4) of the EA 1992 mandates a discharge of the fugitive if a prima facie case is not made out.

G **[25]** However, if there is a binding arrangement between Malaysia and another country (here the USA) that provides for the prima facie requirement to be dispensed with, s 4 of the EA 1992 allows the Minister to give a direction in writing to apply the modified procedure under s 20 of the EA 1992, that does not require a prima facie case to be made out. It is to be noted that para 3 H of the US extradition order provides that the provisions of the EA 1992 shall apply in relation to the United States of America. By para 4 of the US extradition order, the US Extradition Treaty is annexed as part of the US extradition order. Article 7(3)(c) of the US Extradition Treaty provides, inter alia, that proof of a prima facie case against the fugitive criminal is not required I as a condition for extradition.

[26] Therefore, s 20 of the EA 1992 only applies when the Minister issues a written direction under s 4. This direction allows the prima facie requirement to be waived, but only if there is an agreement between Malaysia and the

requesting country that allows this, as in the present appeal between Malaysia and the USA.

[27] In the present appeal, the procedures employed against the respondents was not s 19 but s 20 read with s 4 of the EA 1992. Therefore, since the process under s 20 read with s 4 of the EA 1992 was invoked against the respondents, the respondents then filed the OS to declare s 4 read with s 20 of the EA 1992 as unconstitutional and ultra vires the Federal Constitution.

[28] On 26 January 2023, the learned judge made an order to declare s 20 read together with s 4 of the EA Act 1992 as unconstitutional, null, void and of no effect, being in contravention of arts 4(1), 5(1) and (2), 8(1) and (2), 9(1) and (2) and 121(1) of the Federal Constitution.

[29] The learned judge made a sweeping order despite making a finding that the impugn sections offends only art 121(1) of the Federal Constitution. In paras [80] and [81] of the judgement, the learned judge made the following findings:

> [80] In the circumstances of the case, s 20, read together with s 4 of the EA, offends art 121(1) of the Federal Constitution and ought, therefore, to be struck down, and I so hold.
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> [81] This decision is based on art 121(1) of the Federal Constitution, which to my mind, is sufficient for me to make a declaration that the impugned sections are void for being unconstitutional under art 4(1).

[30] Therefore the only issue for consideration before this court is whether s 4 read with s 20 of the EA 1992 is ultra vires art 121(1) of the Federal Constitution, which reads:

> 121 Judicial Power of the Federation
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> (1) There shall be two High Courts of co-ordinate jurisdiction and status, namely —
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> (a) one in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry at such place in the States of Malaya as the Yang di-Pertuan Agong may determine; and
>
> (b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang di-Pertuan Agong may determine;
>
> (c) (Repealed)
>
> and such inferior courts as may be provided by federal law and the High

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> Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law.

[31] In para [69], the learned judge posed the issue for determination, that is, whether the role of the sessions court under s 20 of the EA 1992 is purely administrative or judicial.

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[32] The learned judge then relied on the case of *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561; [2017] 5 CLJ 526 and said as follows:

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> [72] The landmark ruling of the Federal Court in *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561; [2017] 5 CLJ 526 (FC) is celebrated by many as the reassertion of the independence of the Judiciary. In short, the Federal Court held that it is not possible for Parliament to pass laws that have the effect of diluting the exercise of judicial power by the Judiciary because the Federal Constitution, by virtue of art 121 of the Federal Constitution, vests that power in the Judiciary.

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[33] In *Semenyih Jaya*, the Federal Court examined the constitutionality of s 40D(1) of the Land Acquisition Act 1960 ('the LAA'). This provision allowed two lay assessors, rather than the judge, to conclusively determine the amount of compensation in land acquisition matters. The Federal Court held s 40D to be ultra vires art 121(1) of the Federal Constitution, which provides that judicial power resides solely within the Judiciary. The decision emphasised that judicial power cannot be exercised by non-qualified individuals or non-judicial persons. Section 40D which required the judge to either adopt the opinion of the two assessors or agree with one of them if their opinions differed, amount to an abdication of judicial power and is therefore unconstitutional.

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[34] After applying the principle of *Semenyih Jaya* to the factual matrix to the case, the learned judge made the following findings:

> [75] Applying the law and asking the same question to the facts in the instant OS, wherefore now stand the judge of the sessions court? *In view of the mandatoriness of s 20 of the EA, the judge would seem to sit by the sideline and dutifully commit the fugitive criminal to prison to await the order by the Minister for his surrender. The sessions court, for all intents and purposes, is practically prevented from applying its mind and exercising independent discretion to determine whether the fugitive criminal can be committed to prison to await the order by the Minister for his surrender*. (Emphasis added.)

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[35] The learned judge then made a finding that under s 20 of the EA 1992, the session court is required to commit the fugitive to prison to await the Minister's order for surrender. This leaves the sessions court with little room to independently assess or exercise its judicial discretion in deciding whether the

fugitive should be committed to prison. Added to that, the term 'direction' by the Minister in s 20 of the EA 1992 means that a non-judicial Minister can direct a sessions court judge to commit a fugitive criminal to prison to await the Minister's surrender order. This action is therefore ultra vires art 121 of the Federal Constitution.

[36] However, we are of the considered opinion that the issue of whether the role of the sessions court under s 20 of the EA 1992 is purely administrative or judicial has already been decided by the Federal Court in *Said Mir Bahrami v Pengarah Penjara Sungai Buloh, Selangor* [2013] 2 MLJ 478; [2013] 5 CLJ 447. Despite the fact that the apex court decision in *Said Mir Bahrami v Pengarah Penjara Sungai Buloh, Selangor* was referred to the learned judge during the hearing, the learned judge refused to apply the same and made the following declaration in para [62]:

> Make no mistake. I am bound by the doctrine of stare decisis.

[37] Instead, in his attempt to side step the Federal Court decision, the learned judge said as follows:

> [59] In deference to the learned SFC, I have gone through the judgment of the Federal Court with the proverbial toothcomb and come to an inevitable conclusion that the constitutionality of the impugned sections was never canvassed at the appeal nor determined by the apex court ...

[38] In *Said Mir Bahrami*'s case, the appellant, a citizen of Afghanistan, was arrested in Malaysia at the request of the Australian Government to face charges under Australia's Migration Act 1958. The Malaysian sessions court approved his extradition, and he was imprisoned while awaiting an extradition order under the Extradition Act 1992 and an extradition treaty between Malaysia and Australia.

[39] Under article 4(6) of the Treaty, Malaysia and Australia agreed to waive the prima facie requirement for extradition. The Minister, acting under s 4 of the EA 1992, directed that the application proceeded under s 20.

[40] The detainee argued that his arrest and detention were unlawful and sought release through a habeas corpus application to the High Court. The High Court rejected his request, and he appealed to the Federal Court, claiming that the extradition law and treaty violated his right to a fair trial by removing the requirement of a prima facie case before an extradition is concluded.

[41] The Federal Court held that extradition proceedings are based on comity and reciprocity, serving as a committal process rather than a full trial.

They aim to determine if the evidence is sufficient for extradition, not to assess the appellant's guilt. As such committal proceedings are not criminal trials conducted to ascertain a person's guilt.

[42] No doubt the constitutionality of the impugn provisions of the EA 1992 is not the issue in *Said Mir Bahrami*'s case. However, the application of ss 4 and 20 was the very issue before the Federal Court, where one of the contentious issues is whether the dispensing of the prima facie rule amounted to a deprivation of the appellant's fundamental right to a fair trial. On this, the Federal Court held as follows in para [15]:

> [15] The question is whether the above provisions are draconian in nature *such as to deprive the appellant of his fundamental rights of a fair trial*. With respect, we do not think so. *This is because extradition proceeding is in the nature of a committal proceeding. It cannot be equated with a trial proper. A committal proceeding of this nature is not a trial to determine the guilt of the appellant* but only to determine whether the evidence adduced is sufficient to commit the appellant for the purpose of extradition. (Emphasis added.)

[43] The Federal Court in *Said Mir Bahrami* case had referred to the case of *Chua Han Mow v Superintendent of Pudu Prison* [1980] 1 MLJ 219; [1979] 1 LNS 14, where Raja Azlan Shah CJ (Malaya) (as His Majesty then was) speaking on the same subject said it in the following words:

> [16] In *Chua Han Mow v Superintendent of Pudu Prison* [1980] 1 MLJ 219; [1979] 1 LNS 14, Raja Azlan Shah CJ (Malaya) (as His Majesty then was) speaking on the same subject said it in the following words:
>
> > *an extradition proceeding is in the nature of a committal proceeding and a committal proceeding is not a trial*. As the sole function of the committing magistrate is to adjudicate upon the question of whether there is a prima facie case against the accused, that is to say, whether there is such evidence that, if uncontradicted at the trial, a reasonable jury properly directed could convict upon it. Where there is a doubt as to the weight or quality of the evidence the committing magistrate should refrain from assessing it but instead commit the accused and leave the duty of resolving the doubt to the trial court. (Emphasis added.)

[44] Therefore, the Federal Court had already decided that an extradition proceeding is not a trial. While the term prima facie is mentioned, the committing magistrate's discretion to admit or reject evidence is limited. This aligns with the principles of comity and reciprocity in extradition proceedings, ensuring that local fairness standards do not override international treaty obligations and standard rules of admissibility.

[45] Extradition proceedings must also follow established rules and procedures under s 20 of the EA 1992. This section ensures fairness by allowing both prosecution and defence to present their case. It requires the prosecution

to provide supporting documents and mandates that the alleged act, if committed in Malaysia, must constitute an offense under Malaysian law. Additionally, it allows the fugitive to raise defences against the extradition request as set out in sub-s 20(1)(d).

[46] Since an extradition proceeding is not a trial, it is not an exercise of judicial power. Therefore, since the session court is not exercising judicial power in an extradition proceeding under s 4 read with s 20 of the EA 1992, there is no issue of interfering with the session court judicial power as held by the learned judge. Section 4 read with s 20 is therefore not ultra vires art 121(1) of the Federal Constitution.

CONCLUSION

[47] For the above reasons, we find that the learned judge has erred in law in his decision that warrant our appellate intervention. The appeal is allowed and the decision of the learned judge is set aside. We make no order as to costs.

Appeal allowed; decision of High Court judge set aside with no order as to costs.

Reported by Dzulqarnain Ab Fatar